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Supreme Court, U.S.
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No. 85-83

IN THE

Supreme Court of the United States

October Term, 1985

EVELYN ZERMAN,

Petitioner,

v.

ANDREW J. MELTON, Jr., ROBERT M. GARDINER, PETER BYRNE and DEAN WITTER REYNOLDS, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS ANDREW J. MELTON, Jr., ROBERT M. GARDINER, PETER BYRNE & DEAN WITTER REYNOLDS, INC. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner's failure to present good or sufficient reasons for granting of a writ of certiorari warrants denial of the petition.

2. Whether the frivolous nature of this petition supports an award of appropriate damages.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1970) 7

Zerman v. Jacobs, 459 U.S. 811 (1982) 10

Zerman v. Jacobs, 104 S.Ct. 183 (1983) 10

Zerman v. Jacobs, 104 S.Ct. 399 (1983) 10

Statutes:

Securities Act of 1933,

Section 12(2), 15 U.S.C. §771(2) (1981)..... 3,4,7

Section 17(a), 15 U.S.C. §77q (1981) 6

Rules of the Supreme Court of the United States:

Rule 17 5

Rule 49 12

Federal Rules of Civil Procedure:

Rule 9(b) 3,4,6

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A.5-A.6) is unreported. A prior

opinion of the court of appeals (Pet. App.A) is reported at 735 F.2d 751. The order of the district court (Pet. App. B) is unreported.

JURISDICTION

The order of the court of appeals was entered on March 25, 1985, and the petition for a writ of certiorari was filed on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In October 1982, Petitioner Evelyn Zerman filed suit against Respondents for alleged wrongs committed by them in connection with her securities account at Dean Witter Reynolds Inc. ("Dean Witter").[1] Respondents' subsequent motion to dismiss was granted by

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1 The two other cases to which the petition relates do not involve Respondents but will be addressed infra, in connection with Respondents' request for an award of damages.

the district court (Pet. App. B) and the dismissal affirmed by the court of appeals (Pet. App. A-A.4). A petition for rehearing was denied by the court of appeals (Pet. App. A.5-A.6).

Petitioner's claims against Respondents arose primarily out of her purchase of a Government National Mortgage Association ("GNMA") Certificate and United States Treasury Bonds (Pet. App. B.3). Her numerous claims, made under a variety of federal and state laws, were primarily dismissed for failure to satisfy Rule 9(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 9(b) (Pet. App. A.2-A.4). The district court dismissed the claim made under section 12(2) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §771(2) because, for that purpose as well as others, GNMA Certificates and U.S. Treasury Bonds are exempt securities

and thus not susceptible to a section 12(2) claim (Id.). Neither the correctness of the section 12(2) decision, nor the validity of the statute pursuant to which it was made, ever was addressed in the court of appeals (Pet. App. A-A.4).

Because of the "repetitive actions alleging similar fraud by various brokerage houses" which she and her husband had filed over a period of time long enough to have instructed them in the "complexities of their investment transactions" and their "peculiar vulnerability to fraudulent conduct," the court of appeals denied Mrs. Zerman the "usual opportunity" to amend her complaint before dismissal under Fed.R.Civ.P. 9(b) (Pet. App. A-3, A-4).

ARGUMENT

1. The considerations governing the granting of a writ of certiorari are contained in Rule 17 of this Court, and make clear that review will be granted "only when there are special and important reasons therefor." Reasons given by the Rule, not an exclusive listing, include a conflict among courts of appeals and an egregious departure by such a court from "the accepted and usual course of judicial proceedings." Review may also be granted when a court of appeals has decided "an important question of federal law" which either has not been but should be determined by this Court, or which conflicts with a decision of this Court.

The petition meets none of these requirements. Moreover, to the extent that the petition raises an issue regarding the availability of a private cause of action

under §17(a) of the Securities Act, 15 U.S.C. §77q, not only was it not raised in the court of appeals (Pet. App. A-A.4), but it is largely irrelevant to Petitioner's case. Mrs. Zerman's fraud claims were dismissed because they were not pleaded with the particularity required by Fed. R. Civ. P. 9(b) (Pet. App. B - B.4). Since any claim under §17(a) is a fraud claim also subject to the requirements of Fed. R. Civ. P. 9(b), the availability of such a remedy would have been and is of no matter to her. The court of appeals agreed with the district court that none of Mrs. Zerman's fraud claims were pleaded with sufficient particularity, and denied to her the opportunity to amend prior to dismissal (Pat. App. A.3-A.4).

As to the issue raised by Petitioner concerning the exemption of securities issued or guaranteed by the United States from

various provisions of the Securities Act, that issue was not raised by the petitioner in either the district court or the court of appeals (Pet. App. B - B.4, A - A.4) and should thus not be reviewed in this Court. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1970). Petitioner's attempt to use the current publicity this question has received as an afterthought for obtaining review by this Court should not be countenanced. Moreover, the exemption only prevented Mrs. Zerman from asserting a claim pursuant to §12(2) of the Securities Act. Her claims asserted pursuant to other federal as well as state laws, regulating securities and otherwise, were fully considered below. She was thus in no manner prevented from recovering for perceived wrongs. The petition should be denied.

2. In addition to denial of the petition, damages should be awarded to Respondents based upon the frivolous nature of this petition.

The case involving Respondents is but one of three lawsuits, all filed in the United States District Court for the Southern District of New York against brokerage houses, which Petitioners would have this Court review. The two matters not involving Respondents concerned Petitioner Ernest Zerman's securities account at Prudential-Bache Securities, Inc. ("Prudential"). The conduct of their litigation may be described as follows.

Petitioners are husband and wife, the former an attorney (Pet. App. A.2, D.2). In June of 1980 Mr. Zerman commenced an action against Prudential and was ordered to arbitrate his claims after Prudential moved to compel arbitration. (Pet. App. D.2-D.3). The

order to arbitrate was affirmed by the court of appeals (Id.). Thereafter, Ernest Zerman filed a series of motions to resist arbitration and, after twenty months, was enjoined by the district court from filing any further motions until arbitration was had (Id.). Mr. Zerman failed to appear at the arbitration hearing, an award was rendered against him and, on March 8, 1983, the award was confirmed by the district court and a judgment entered thereupon (Id.).

Over a year later Mr. Zerman moved before the district court to set aside that final judgment (Id.). That motion was denied as patently frivolous and, on December 13, 1984, that denial was affirmed by the court of appeals (Pet. App. D.1, D.3-D.4, D.6, D.9-D.10). Zerman was assessed double costs plus $2,500 damages for taking a frivolous appeal (Pet. App. D.5-D.6). Two prior

petitions for writs of certiorari filed by Zerman in that matter had been denied by this Court on October 3 and November 7, 1983. Zerman v. Jacobs, 104 S.Ct. 183 (1983); Zerman v. Jacobs, 104 S.Ct. 399 (1983). His motion to direct the Clerk of this Court to file his petition had been denied on October 2, 1982. Zerman v. Jacobs, 459 U.S. 811 (1982).

In early November, 1983, suspiciously close in time to when Mr. Zerman's second petition had been denied by this Court, his second litigation against Prudential was filed in the United States District Court for the Southern District of New York (Pet. 6). The New York Stock Exchange, under whose auspices Prudential had conducted its court-ordered arbitration against Mr. Zerman, was included as a defendant (Id.). By Order dated May 7, 1984, the district court granted the defendants' motions to dismiss (Id. at 6-7). The

court of appeals affirmed by decision dated January 31, 1985 (Id. at 7) and assessed attorneys' fees of all appellees against Zerman (Pet. App. C.2,C.4). Claims for attorneys' fees of $7,937.50 and $4,000 were approved accordingly in favor of The New York Stock Exchange, and Prudential, Loren P. Lyon and Irene Schonzeit, respectively (Id.). A petition for rehearing was denied by the court of appeals on March 20, 1985 (Pet. App. C.5,C.6).

It was on October 22, 1980, shortly after her husband filed suit against Prudential, that Evelyn Zerman opened her account with Respondent Dean Witter and, two years later, filed suit against it as well as the three remaining Respondents (Pet. App. B, B.2).

Thus, the court of appeals has assessed double costs, damages of $2,500. and

a total of $11,937.50 in attorneys' fees against Petitioner Ernest Zerman for the filing of frivolous appeals. This occurred because Zerman failed to heed the warning given to him in his wife's case by that Court, in affirming the dismissal obtained by Respondents, that "repetitive and baseless claims brought to recoup investment losses may lead to such an award" (Pet. App. A.4; D.6, n. 2).

Rule 49 of the Rules of this Court provides in pertinent part that:

> 2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

It is respectfully submitted that the Zermans' petition supports an award of damages against them and in favor of Respondents. This Court is requested to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, with an award of attorneys' fees to Respondents.

September 26, 1985

Respectfully submitted,

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